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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 STEVEN O'NEAL WADE,

12 Petitioner,

13 v.

14 SCOTT FRAKES,

15 Respondent.

16 Case No. C07-5439 FDB/KLS

17 REPORT AND
18 RECOMMENDATION

19 **NOTED FOR:**
20 November 16, 2007

21 This habeas corpus action has been referred to United States Magistrate Judge Karen L. Strombom pursuant to Title 28 U.S.C. §§ 636(b)(1) and Local MJR 3 and MJR 4. Petitioner filed this action under 28 U.S.C. § 2254 challenging his 1998 convictions for First Degree Robbery, Burglary and Second Degree Assault. (Dkt. # 4). The Court's records reflect that this petition is successive. Accordingly, the undersigned recommends that this file should be administratively closed and the case transferred to the Ninth Circuit in accordance with Circuit Rule 22-3(a).

22 DISCUSSION

23 Ninth Circuit Rule 22-3 (a) states:

- 24 (a) **Application.** Any petitioner seeking leave to file a second or successive
25 2254 petition or 2255 motion in district court must seek leave under 28
26 U.S.C. §§ 2244 or 2255. An original and five copies of the application Must
27 be filed with the Clerk of the Court of Appeals. No filing fee is required. If a
28 second or successive petition or motion, or application for leave to file such a
 petition or motion, is mistakenly submitted to the district court, **the district**

court shall refer it to the court of appeals.

(Emphasis added).

Petitioner's previous habeas challenges were dismissed. Petitioner first filed a petition for writ of habeas corpus on May 10, 1999 in Case No. 99-5217FDB. That petition was dismissed without prejudice on February 16, 2000, to allow Petitioner to return to state court to exhaust his state court remedies. (Dkt. # 30). Petitioner filed his second petition for writ of habeas corpus on October 4, 2000 in Case No. C00-5572FDB. That petition was denied on the merits. (Dkt. # 23).

In 2003, Petitioner found a ministerial error in his judgment and sentence (the document did not specify the precise term of his community placement and the error was corrected). *State v. Wade*, 138 P.3d 168, 861 (Wash.App. 2006) (judgment affirmed; Court of Appeals lacked authority to recall mandate to reexamine merits of trial and initial appeal). By virtue of the initial recall, Petitioner now argues that his case was not final until after *Blakely v. Washington*, 542 U.S. 296 (2004) and that the one-year statute of limitations in 28 U.S.C. 2244(d) does not bar his petition.

Notwithstanding the action of the Washington Court of Appeals in recalling the mandate to correct an inadvertent mistake, the petition before this Court is a “second or successive” petition and should be transferred to the Ninth Circuit Court of Appeals consistent with the dictates of Rule 22-3 (a).

CONCLUSION

Accordingly, the Court should transfer this habeas corpus petition as a second or successive petition and administratively close the file. A proposed order accompanies this Report and Recommendation. Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from service of this Report to file written objections. *See also* Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985). Accommodating the time limit imposed

REPORT AND RECOMMENDATION

1 by Rule 72(b), the Clerk is directed to set the matter for consideration on **November 16, 2007**, as
2 noted in the caption.

3 DATED this 17th day of October, 2007.

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7 Karen L. Strombom
United States Magistrate Judge

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